2003

State of Utah, Plaintiff/Appellant, v. Daniel Bagley Rogers Defendant/Appellant: Reply Brief

Utah Court of Appeals

Jeffrey S. Gray; Mark L. Shurtleff; Attorney General; Attorney for Appellee.
Debra M. Nelson; Shannon Romero; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	
DANIEL BAGLEY ROGERS	:	Case No. 20030953-CA
Defendant/Appellant	:	

REPLY BRIEF OF APPELLANT

Appeal from the Third District Court's Order denying Defendant's Motion to Quash the Bindover Order for trial on Theft by Receiving Stolen Property, a second degree felony, in violation of Utah Code Ann. § 76-6-408 (1999). Appellant is incarcerated.

DEBRA M. NELSON (9176)
SHANNON ROMERO (2722)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Plaintiff/Appellee

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SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Plaintiff/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	
DANIEL BAGLEY ROGERS	:	Case No. 20030953-CA
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A preliminary hearing is not meant to serve as "a rubber stamp for the prosecution." State v. Clark, 2001 UT 9, ¶10, 20 P.3d 300. Instead, the role of a preliminary hearing is to "act[] as a screening device" ferreting out "'groundless and improvident prosecutions.'" State v. Brickey, 714 P.2d 644, 646 (Utah 1986). The role of a preliminary hearing "is important because it not only relieves the accused of the 'substantial degradation and expense' attendant to a criminal trial, but also . . . helps conserve judicial resources and promote[] confidence in the judicial system." Id. In order for the State "[t]o establish a factual and legal basis for binding the defendant over for trial at a preliminary hearing, the State must introduce sufficient evidence [on all the elements of the offense charged] to persuade the magistrate that there is probable cause to believe that the crime charged has been committed and that the defendant has committed it." Brickey, 714 P.2d at 646 (internal quotations omitted). Even though the preliminary hearing "is not a full-blown determination of an accused's guilt or innocence,

it is nonetheless a 'critical stage' in the criminal process" where a "defendant's constitutional rights must be observed." Id. Therefore, "when potential abusive practices are involved, the presumption is that due process will bar refiling." State v. Morgan, 2001 UT 87, ¶16, 34 P.3d 767.

However, at the preliminary hearing stage due process considerations not only "prohibit a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence "absent a showing that new or previously unavailable evidence has surfaced or that other good cause" exists but also prohibit reopenings or continuances because the very same due process concerns are implicated. Id. Otherwise, the State would be able circumvent the protections of Brickey and effectively eviscerate the due process protection. Under Utah Rule of Criminal Procedure 7(i) a magistrate is required to dismiss an information or bindover on a lesser charge upon finding that insufficient evidence exists on an essential element of the crime charged. In this case, had the magistrate followed procedural rules, the State would have been precluded from refiling because the prosecutor's dilatory preparation for the preliminary hearing which resulted in her inability to present sufficient evidence on essential elements of the crime does not qualify as an innocent miscalculation.

Therefore, Mr. Rogers respectfully asks that this Court reverse the district court's denial of his motion to quash the bindover and either order the information dismissed or the charges reduced to a class A misdemeanor.

POINT I. DUE PROCESS AND THE PRINCIPLES OF BRICKEY ARE IMPLICATED WHEN THE STATE IS ALLOWED TO REOPEN AND CONTINUE A CASE TO PRESENT SUFFICIENT EVIDENCE ON ESSENTIAL ELEMENTS OF A CHARGE.

The State argues that the Brickey jurisprudence does not apply to cases which have been reopened or continued, suggesting that due process is not implicated because the issue has not been previously addressed by the courts. See Appellee Brief 10-11. The State also argues that Brickey should not be extended to cases where the preliminary hearing is reopened or continued because none of the abusive practices identified in Brickey and its progeny are implicated, contending that "[w]here a prosecutor fails to put on sufficient evidence to bind over a defendant," due process does not "bar the court from reopening the case or continuing the hearing to provide the necessary evidence." Appellee Brief 12-14, 24. The State's argument implies that the abusive practices violating due process are limited to forum shopping, repeated filings of groundless and improvident charges for the purpose to harass and intentionally holding back crucial evidence. See Appellee Brief 12.

The distinctions made by the State between refiling and reopening and continuing are insignificant and fail to understand the purpose underlying the Brickey rule. "Overreaching by the State, in any of its forms, is the chief evil [the supreme court] sought to prevent in Brickey." State v. Morgan, 2001 UT 87, ¶15, 34 P.3d 767. "The lodestar of Brickey . . . is fundamental fairness" and its application should not be interpreted as limited only to those practices previously addressed. Id. The State also

suggests that the list of abusive practices that have been explicitly recognized by this Court is exhaustive. On the contrary, the supreme court's holding in State v. Redd , 2001 UT 113, ¶17, 37 P.3d 1160, illustrates how the abusive practices cited in Brickey and its progeny were not meant to be an exhaustive list of the ways in which due process can be violated. Id. In Redd the supreme court added failure to provide any evidence on an essential and clear element of the offense "to the list [of] potentially abusive practice that would prevent refiling because of due process concerns. . . . " 2001 UT 133 at ¶20. Thus, it is "potentially abusive practice[s]" which implicate the protections of Brickey and due process. Id.

Even if the list were limited to those specific abusive practices cited, a defendant subject to reopenings or continuances of his preliminary hearing is exposed to the same due process violations as those where the State refiles. The danger for harassment and intentional holding back of information is even greater when a prosecutor believes he can simply ask for a continuance if the evidence falls short than it is when the State refiles. Without the protections of the Brickey rule, there is little incentive for a prosecutor to come fully prepared to a preliminary hearing with the evidence she has against a defendant. Under the State's theory, a prosecutor facing a dismissal could simply ask the court to reopen or continue the hearing until she was able to present sufficient evidence on the charge. Under such a rule, a defendant would face the possibility of being harassed by multiple continuances. A defendant's life would be left in a lurch while

facing the continued threat of jail time, missed work and court costs. Such a rule would allow the prosecution to present its case in a piecemeal fashion, only divulging the evidence it absolutely had to in order to obtain a bindover. A defendant would be required to repeatedly attend court proceedings and suffer the stress caused by such repeated appearances and the lack of resolution in his case, while also never being able to adequately prepare for his defense. The emotional and financial toll resulting from such a rule would be the very kind due process seeks to prevent.

If the State's argument is followed to its logical conclusion, it would effectively eviscerate the Brickey jurisprudence and undermine due process. It would also undermine the function a preliminary hearing serves of "reliev[ing] the accused of the 'substantial degradation and expense' attendant to a criminal trial [and] . . . help[ing] conserve judicial resources and promot[ing] confidence in the judicial system." Brickey, 714 P.2d 644, 646 (Utah 1986). The State could circumvent due process and the protections offered by the Brickey jurisprudence by simply reopening or continuing a case whenever it has failed to presented sufficient evidence, regardless of the reason, rather than risk refiling. However, due process forbids such a result. Instead, the principles of Brickey apply in cases where the preliminary hearing has been reopened or continued because the very same fundamental fairness and due process concerns are implicated. See Appellant Opening Brief 15-20, n.2.

POINT II. A PROSECUTOR DOES NOT INNOCENTLY MISCALCULATE THE QUANTUM OF EVIDENCE BY MAKING A CALCULATED DECISION TO GO FORWARD WITH A PRELIMINARY HEARING UNPREPARED.

The State argues that "nothing in the record suggests that the prosecutor's failure to produce sufficient evidence regarding value was anything more than an innocent miscalculation." Appellee Brief 18. However, an unprepared prosecutor who consciously decides to go forward with a preliminary hearing and fails to establish sufficient evidence on essential elements of the offense cannot claim to have simply innocently miscalculated the quantum of evidence necessary for bindover. The record is replete with examples of the prosecutor's lack of preparation to meet the State's burden of proof during the preliminary hearing. See also Appellant Opening Brief 20-41. For instance, as pointed out in Appellant's opening brief, the prosecutor failed to elicit testimony that might establish what specific property was missing or recovered and its value. The prosecutor failed to bring the check or pawn receipt to court and was unable to link Mr. Rogers to the alleged check from the card shop or the pawn receipt for the earrings, resulting in a dismissal of the Theft by Deception charge.[1] R. 223: 126, 128.

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[1] The State contends that Mr. Rogers was found "attempting to cash a check, payable to [him], from [the] baseball card shop." Appellee Brief 6. However, the record reflects that the State failed to bring in the check to show in whose name it was written. In addition, the card shop owner could not remember in whose name he had written the check. R. 222:28. Detective Johnson also did not have the check available and could only testify that he "believed" the check was made out to Mr. Rogers. R. 222:34, 50. The State also contends that the pawn receipt from the pawn shop "indicated that [Mr. Rogers] pawned the earrings." Appellee Brief 7. However, the record reflects that there was no proof that the pawn receipt was in Mr. Rogers' name. R. 222:49. The State

The prosecutor failed to make the list of missing items and their values available to the witnesses in ascertaining which of the unique items of memorabilia were recovered. Instead, the record reflects the witnesses were not able to do more than speculate regarding the "probable" worth of the missing or recovered items. R. 222:8-11, 14-15.

The State contends that although Mr. Hildebrand was only able to testify in terms of "estimates [and] 'probable worth,' . . . the State was not required to prove the value of the stolen goods with mathematical certainty." Appellee Brief 17. Therefore, the State argues that through Mr. Hildebrand's testimony it was able to establish "some $10,000 in baseball memorabilia was stolen."[2] Appellee Brief 17. The State argues that although "Mr. Hildebrand did not more specifically identify the cards that were recovered or give a separate estimate of their value . . . he had already estimated the total value of stolen cards to be as much as $8,300." Appellee Brief 18 (emphasis added). So "[w]here [Mr. Hildebrand] had recovered a 'lot of the cards' in the box and 'many of the binders'. . . the

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failed to bring the pawn receipt to the preliminary hearing to establish that Mr. Rogers' name was on it. R. 222:49.

[2]The State mistakenly claims that the "magistrate found that the total value of the 35 autographed balls was between $5,330 and $6,400." See Appellee Brief 17 n.4. However, it was the district court judge who made that finding, not the magistrate. See R. 176. Appellant argued in opening that to the extent that the district court's determination of the value of the stolen property could be used to determine the value of the recovered property, the finding was erroneous. Appellant Brief 36-37 n.6.
The State also asserts that Mr. Hildebrand testified that "he recovered all the autographed baseballs." Appellee Brief 18. However, as the record indicates, Mr. Hildebrand was unsure if he recovered all of his baseballs testifying "I believe all of them, there may be one or two missing, but I think they're all there." R. 222:14.

magistrate could reasonably infer that another $2,700 in cards had been recovered, equating to less than one-third of the value of all the stolen cards ." Appellee Brief 18 (emphasis added). The State essentially argues that if it was able to establish that a sufficiently high enough value of property was stolen, then it is reasonable for the court to infer that the value of the items recovered which could be attributed to Mr. Rogers were or exceeded the $5,000 threshold value to sustain a second degree felony charge. However, as pointed out in Appellant's opening brief at 34-41, such an argument is contrary to Utah case law. Regardless of the value of property the State was able to establish was stolen, the State was required to establish probable cause evidence that the value of the recovered property was or exceeded $5,000 and that the property recovered could be attributed to Mr. Rogers. See Utah Code Ann. §76-6-412(1)(a)(i); State v. Mast, 2001 UT App 402, ¶24, 40 P.3d 1143 (holding "[d]efendant may be ordered to pay restitution only for pecuniary damages resulting from the crime of receiving stolen property, and not for damages resulting from the burglary"); State v. Hill, 727 P.2d 221, 223 (determining defendants could only be found guilty for value of property found in their possession, not total value of stolen items).

The only evidence presented by the State regarding the recovered property consisted of very ambiguous and speculative testimony. As a result of the prosecutor's dilatory preparation for the preliminary hearing, the magistrate determined that insufficient evidence existed on the clear and essential element of value. See Appellant's

Opening Brief 15-50; R. 222:58. The supreme court has already determined that when the state fails to present evidence on an essential element of an offense, it is not an innocent miscalculation of the quantum of evidence. See State v. Redd, 2001 UT 113 at ¶17. The failure to present evidence as to value prior to resting was not an "innocent miscalculation" under the reasoning in Redd. In fact, it would be difficult to imagine any conduct that would not qualify as innocent if the prosecutor's decision not to put on evidence of value in this case were labeled "innocent." Under the circumstances of this case, the prosecutor's conduct does not qualify as "innocent."

POINT III. UTAH RULE OF CRIMINAL PROCEDURE 7(i) MANDATES A MAGISTRATE TO DISMISS THE INFORMATION UPON A FINDING OF INSUFFICIENT EVIDENCE.

The State argues that because rule 7 of the Utah Rules of Criminal Procedure does not explicitly prohibit reopening or continuing a preliminary hearing, it is permitted. However, rule 7 instructs the magistrate that upon a finding of insufficient evidence the information "shall" be dismissed. Utah R. Crim. P. 7(i)(3). The magistrate determined that the evidence presented by the State was insufficient to support a second degree felony charge stating "I don't have enough information about how much material was found and the value of the material found as contrasted with the value of the material stolen . . . I can't assume that all the material that was possessed actually was all the material stolen. . . ." R. 222:58. Once the magistrate made this determination he was required under the rule to either dismiss the charge or bindover on a lesser offense. See

Appellant's Opening Brief 41-50. Had the magistrate dismissed, the State would have been precluded from refiling under Brickey and due process.

The State argues that "[j]ust as a trial court has the discretion to permit the State to reopen its case in response to an insufficiency challenge after the prosecution has rested, a magistrate has the authority to permit the State to reopen its case or to continue a preliminary hearing." See Appellee Brief 23. The State cites State v. Smith, 2003 UT App 52, ¶35, 65 P.3d 648 in support of its proposition. Appellee Brief 23. What the State fails to note is that even a trial court's discretion to allow the prosecution to reopen its case when faced with a motion for directed verdict is limited under Utah Code Ann. §77-17-3 (2003) ("When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged."). In fact, in Smith, this Court rejected the argument made by the State that even if the defendant had moved for a directed verdict based on a lack of evidence on a necessary element of the offense, "the State could have 'properly and with little difficulty . . . moved to reopen and supply the missing evidence.'" Smith, 2003 UT App 52 at ¶35. Unconvinced, this Court reasoned that where the State failed to introduce sufficient evidence on an essential element of the offense, the trial court would not have necessarily allowed the State to reopen its case in order to provide the evidence necessary to sustain its burden. Id. This Court stated that "[t]he State's failure to present evidence to satisfy th[e] necessary

element of the offense would have entitled Smith to a dismissal on that count."[3] Id. at 32. Similar circumstances under the Brickey rule would have unquestionably barred the state from refiling. See Redd, 2001 UT 113 at ¶17. Because the State is not allowed to reopen when it has failed to present evidence on an essential element, its argument that the court had discretion to reopen in this case is not persuasive.

But even if this Court were to recognize a magistrate's discretion to reopen or grant a continuance absent a procedural rule allowing it, reopenings and continuances must still be limited by due process and Brickey. As such, in order for the magistrate to grant a motion to reopen or continue a hearing, the State must "show that new or previously unavailable evidence has surfaced or that other good cause justifies" the motion. In this case, the prosecutor's miscalculation of the evidence was not innocent, therefore, good cause did not exist allowing the State to reopen and continue its case.

The district court erred in determining that had the magistrate followed criminal procedural rules and not allowed the State to reopen and continue the preliminary hearing when it had failed to produce sufficient evidence, the state would not have been precluded from refiling.

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[3]Appellant was unable to find a case where the prosecution was not only allowed to reopen its case after it had rested but also to continue it in order to introduce sufficient evidence on a clear and essential element of the crime.

POINT IV. THE STATE'S EVIDENCE DID NOT SUPPORT A PROBABLE CAUSE FINDING THAT MR. ROGERS POSSESSED OR CONTROLLED THE PROPERTY RECOVERED FROM THE APARTMENT OR CO-DEFENDANT'S VEHICLE.

As argued in Appellant's opening brief, the State failed to present sufficient evidence to support a probable cause finding that Mr. Rogers constructively possessed or controlled the property recovered from the co-defendant's vehicle or apartment. Appellant's Opening Brief 30-34. The prosecutor failed to establish a "sufficient nexus" between Mr. Rogers and the property recovered from the co-defendant's apartment and vehicle to permit an inference that Mr. Rogers "had the power and the intent to exercise dominion and control over" it. State v. Layman, 1999 UT 79, ¶13, 985 P.2d 911. This was a vehicle owned by the co-defendant's girlfriend established as having been lent specifically to the co-defendant. R. 222:43-44. Similarly, the apartment was one that was rented by the co-defendant and his girlfriend. R. 222:41-42. Detective Johnson had no information that Mr. Rogers resided there. R. 222:42.

Detective Johnson testified that Mr. Rogers was only found in possession of "cards." R. 222:35. Based on this testimony the magistrate determined that Mr. Rogers would only be found in possession of the baseball cards recovered. R. 222:55-57; 223:125; see also Appellant's Opening Brief 31 n.4. The State never offered testimony regarding what property was recovered from the apartment. The only evidence offered regarding property recovered from the apartment was testimony elicited from Detective Johnson by defense counsel. Appellant's Brief 33. Detective Johnson testified that a

search of the apartment revealed "binders" and "[t]he DVD/CD player, . . . several cards, and the Olympic pins, things like that". R. 222:41. Detective Johnson's testimony regarding the property recovered from the trunk of the vehicle was equally ambiguous. R. 222:36, 40-41. Detective Johnson testified that "there were several items, several baseball cards in folders, like photo albums in the trunk." R. 222:36.

Even if this Court determines that a sufficient nexus existed to support a finding that Mr. Rogers constructively possessed the recovered property from the vehicle and apartment, the State still presented insufficient evidence of value to support the second degree felony charge. No evidence was offered about which baseball cards were recovered, how many binders or what cards were in the binders. In sum, no evidence was introduced to specify what exactly was recovered to enable a value to be ascertained. The State failed to show that Mr. Rogers had possession or control over the property recovered from the apartment and vehicle which is an essential element of the offense.

CONCLUSION

For these reasons and those more fully set forth in Appellant's Opening Brief, Mr. Rogers respectfully requests that this Court reverse the district court's denial of his motion to quash the bindover and order the information to be dismissed. Alternatively, Appellant respectfully requests that this Court order the charges to be reduced to a class A misdemeanor.

SUBMITTED THIS 10th day of August, 2004.

DEBRA M. NELSON
Attorney for Defendant/Appellant

SHANNON ROMERO
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6 th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 10th day of August, 2004.

DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____day of August, 2004.